

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Rural Health Care Support Mechanism

Request of Ketchikan Indian Community Tribal Health Clinic for Waiver of the Form 462 and Form 463 filing deadlines set forth in Sections 54.675(c)(4) and 54.645(b) of the Commission's rules, 47 C.F.R. § 54.675(c)(4) and 54.645(b), respectively

WC Docket No. 02-60

HCP No. 11763 (Ketchikan Indian Community Tribal Health Clinic)

REQUEST FOR WAIVER

Pursuant to Sections 1.3 of the Commission's rules, 47 C.F.R. § 1.3, Ketchikan Indian Community Tribal Health Clinic ("KIC", the "Applicant") hereby requests a waiver of the June 30, 2015 Form 462 filing deadline for funding requests under the Healthcare Connect Fund ("HCF") universal service support mechanism contained in Section 54.675(c)(4) of the Commission's rules.¹ The Applicant attempted to tender its Form 462 funding requests before the June 30, 2015 deadline, but "My Portal," the electronic filing system of the Rural Health Care Division ("RHCD") of the Universal Service Administrative Company ("USAC"), which administers the HCF, improperly refused to accept it, in violation of an explicit Commission directive.

Background

As discussed below, the Applicant seeks this waiver because it has been denied the ability to request funding from the Commission's new HCF, contrary to the Commission's implementing Order.

¹ 47 C.F.R. § 54.675(c)(4). To the extent required, the Applicant also seeks a waiver of the December 31, 2015 deadline for the Form 463 filing associated with this funding request, 47 C.F.R. § 54.645(b) ("All invoices must be received by the Administrator within six months of the end date of the funding commitment").

A. The Healthcare Connect Fund

In December 2012, the Commission adopted the framework for the HCF support mechanism. HCF replaced the former Internet Access Program of the Rural Health Care (“RHC”) support mechanism, which provided a 25 percent discount on Internet Access services to eligible health care providers (“HCPs”). The HCF now requires HCPs to “contribute 35 percent towards the cost of all items for which they seek support, including services, equipment, and all expenses related to infrastructure and construction,” with the balance coming in the form of support from the HCF mechanism.² To ease the transition, the Commission also continued to make funding available under the former Internet Access program through the end of funding year (“FY”) 2013.³

In order to ensure that HCF applicants meet the definition of a “health care provider” contained in Section 254(h)(7)(B) of the Communications Act of 1934, as amended (“Communications Act”),⁴ the Commission requires each HCF applicant to provide certain information to the RHCD establishing its eligibility for HCF support.⁵ The Commission streamlined the former process by permitting new applicants to complete this eligibility certification process at any time during the funding year, rather than before participating in the competitive bidding process.⁶ And, the Commission explicitly provided that “HCPs who have previously received an eligibility determination from USAC (*i.e.* HCPs who already participate

² *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, FCC 12-150, 27 FCC Rcd 16678 (2012) (“*Healthcare Connect Order*”), at ¶¶ 81-82.

³ *Id.* at ¶ 46.

⁴ 47 U.S.C. § 254(h)(7)(B).

⁵ *Healthcare Connect Order* at ¶ 214.

⁶ *Id.*

in the existing RHC programs) are not required to submit a Form 460 prior to submission of a Form 461," unless and until they undergo a "material change" in specific characteristics that could affect their eligibility.⁷

B. The Applicant

The Ketchikan Indian Community (KIC) has more than 5700 members. KIC Tribal Health Clinic provides multi-level medical, dental and social services to all Alaska Native and American Indians residing in the Ketchikan Gateway Borough. It delivers state-of-the-art primary care and other medical services to patients each year using care teams that include approximately 70 professional, technical and clerical staff. It uses MPLS and DIA services to meet its connectivity needs, including transmitting X-rays, video conferencing, remote application access, remote reporting, and transmission of scanned images.

On July 2, 2012, the KIC Tribal Health Clinic signed a three-year contract with Alaska Communications Systems for 40 Mbps MPLS and 30 Mbps DIA services, for a three-year term, which started on November 30, 2012. Since that time, KIC has received support for these services from the Telecommunications Program and the Internet Access program, respectively. The RHCD has placed this contract in evergreen status,⁸ meaning that KIC was not required to conduct further competitive bidding for the duration of the contract term.

As indicated above, the Applicant operates under a service contract that identifies separate charges for its MPLS and DIA services, rather than delivering those two services as an integrated bundle. As a result, the Applicant formerly received support for its DIA services

⁷ *Id.*

⁸ See Funding Commitment Letter to Rodney J. Short, Ketchikan Indian Community Tribal Health Clinic, Funding Request No. 12114681 (May 8, 2013).

through the Internet Access program, and determined that it would need to make the transition to the HCF in order to receive support for its DIA service for FY 2014.

Discussion

Here, the Applicant seeks a waiver of the June 30, 2015 Form 462 filing deadline for HCF funding requests, 47 C.F.R. § 54.675(c)(4), and, to the extent required, a waiver of the corresponding deadline for filing the Form 463, which generally falls six months later, on December 31, 2015, 47 C.F.R. § 54.645(b). The Commission may waive its rules for “good cause shown.”⁹ More specifically, the Commission may exercise its discretion to waive a rule where special circumstances warrant a deviation from the general rule and such deviation would serve the public interest, or where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In making this analysis, the Commission may take into account consideration of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ This request meets that standard.

1. Special Circumstances Warrant a Deviation from the General Rule

Special circumstances in this case warrant a waiver of the filing deadline for the Applicant’s Form 462 funding request. Specifically, before filing its Form 462 funding request, and contrary to the Commission’s explicit directive announced in the *Healthcare Connect Order*, the RHCD improperly required this Applicant to obtain a new determination of HCF eligibility by filing a Form 460 and obtaining RHCD approval. When that eligibility certification process

⁹ 47 C.F.R. § 1.3.

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

¹¹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

was not complete before the June 30, 2015 Form 462 filing deadline, the RHCD's electronic filing system, My Portal, would not accept the Applicant's Form 462 filing. By the time the RHCD certified the Applicant's eligibility, the deadline had passed. Because the filing deadline is contained in a Commission rule, which USAC may not waive, the RHCD was unable to resolve the issue.

While HCF is a new program, eligibility remains tied to the same statutory criteria that have governed the other RHC support mechanisms for nearly two decades. Thus, in the *Healthcare Connect Order*, the Commission streamlined the HCF application process in two important ways. *First*, it provided that, while new applicants must obtain eligibility certifications from the RHCD before receiving HCF support, those that have previously been found eligible based on their prior participation in the Telecommunications Program or Internet Access Program "are not required to submit a Form 460 prior to submission of a Form 461," unless and until they undergo a "material change" in certain characteristics that could affect their eligibility.¹²

Second, the Commission streamlined the transition to HCF for those HCPs that were already receiving DIA support under evergreen contracts, by extending existing evergreen treatment to the new HCF mechanism. Thus, the Commission stated that HCF applicants that wish to receive support based on a previously signed evergreen contract may do so without further competitive bidding and that such HCPs may "proceed directly to submitting a funding commitment request."¹³

¹² *Healthcare Connect Order* at ¶ 214.

¹³ *Id.* at ¶ 228 ("[A]pplicants who wish to request support under the Healthcare Connect Fund while utilizing contracts previously endorsed by USAC (Master Services Agreements under the Pilot Program or the Healthcare Connect Fund, or evergreen contracts in any of the health

Nevertheless, to the Applicant's knowledge, the implementation of HCF in the USAC "My Portal" filing system required *all* HCF applicants to file and obtain RHCD approval of Form 460 eligibility certifications – even those that had previously received funding through other RHC support mechanisms – before filing either Form 461 requests for service or Form 462 funding requests. That fact is confirmed by contemporaneous USAC training materials, which state that, "[a]ll HCPs, consortia, and consortium members must obtain an eligibility determination via FCC Form 460 to receive HCF Program support, even if deemed eligible for another program."¹⁴ This statement, while ultimately consistent with the performance of the My Portal online filing system, is directly at odds with the Commission's *Healthcare Connect Order*.

For the Applicant, this inconsistency between the Commission's directive and the RHCD's implementation of the HCF came to light only at the end of the funding year, and too late for it to complete the certification process. Because the Applicant was operating under an

care programs, or master contracts the E-rate program) may do so without undergoing additional competitive bidding, as long as they do not request duplicative support for the same service and otherwise comply with all program requirements. In addition, consistent with current RHC program policies, applicants who receive evergreen status or multi-year commitments under the Healthcare Connect Fund are exempt from competitive bidding for the duration of the contract, as discussed below. Applicants who are exempt from competitive bidding can proceed directly to submitting a funding commitment request."); *see also Rural Health Care Support Mechanism*, WC Docket No. 02-60, Public Notice, "Wireline Competition Bureau Provides Clarification Regarding Evergreen Contract Endorsements Under the Telecommunications and Healthcare Connect Fund Programs of the Rural Healthcare Support Mechanism," DA 15-809 (rel. July 10, 2015), at 2 ("If USAC designates a contract as "evergreen" under the Telecommunications Program, that designation will also apply under the Healthcare Connect Fund Program, and vice versa. In both instances, the HCP will not be required to undergo additional competitive bidding for the life of the evergreen contract.").

¹⁴ USAC HCF Training for Individual HCP Applicants, "2013 HCF Program Training – Overview of FCC Forms: Individual Applicants" (Sept. 23, 2013), at Slide 6 (*available at*: http://www.usac.org/res/documents/RHC/training/2013/2013-HCF-Fall-Training-Forms-Overview_Individual.pdf).

evergreen contract, it was not required to file a Form 461 request for services or solicit competitive bids in FY 2014. Rather, as the end of the funding year drew near, it prepared and attempted to file its respective Form 462 request for funding under its existing evergreen contract, as should have been permitted under the plain language of the *Healthcare Connect Order*. Not until mid-June, therefore, did it discover that the My Portal system would not accept a Form 462 filing, despite the Commission's directives, until after the RHCD had approved the Applicant's Form 460 eligibility certification. Although the Applicant here filed a Form 460 promptly after discovering this fact and before the end of FY 2014, the damage was done. The Commission's *Healthcare Connect Order* gives USAC 30 days to review the Form 460 and notify the applicant of its eligibility determination.¹⁵ Although the RHCD found the Applicant eligible, it did not complete its review until after the June 30 filing deadline for the Form 472 had passed.

2. A Waiver Would Serve the Public Interest

The requested waiver would serve the public interest for at least three reasons. *First*, this waiver would achieve a more effective implementation of overall Commission policy on an individual basis¹⁶ by correcting the RCHD's previous error and adhering to the Commission's clear policy directive. Here, the Commission chose to create the HCF in order to "expand health care provider (HCP) access to broadband, especially in rural areas, and encourage the creation of state and regional broadband health care networks."¹⁷ It did so because "access to broadband for

¹⁵ *Healthcare Connect Order* at ¶ 215 ("USAC should notify each applicant of its determination (or whether it needs additional time to process the form) within 30 days of receipt of Form 460.").

¹⁶ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁷ *Healthcare Connect Order* at ¶ 1.

medical providers saves lives while lowering health care costs and improving patient experiences.”¹⁸

By improperly foreclosing access to HCF support for Applicants and perhaps others, USAC has hampered achievement of the Commission’s policy goals for HCF. The Commission should correct USAC’s implementation error in order to maximize the benefits of the HCF and most fully realize the program’s public policy benefits.

Second, the choice to require *all* HCF applicants to file Form 460 and obtain an eligibility certification, regardless of whether they had previously participated in or received support under other RHC support mechanisms, was not USAC’s to make. The Commission’s rules state clearly that, “[t]he Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”¹⁹ Implicit in this statement, neither USAC nor the RHCD may contravene Commission rules or policy, or act in a manner inconsistent with Commission directives.

Thus, the Commission should grant a waiver here in order to ensure that the HCF is implemented in the manner it has prescribed. In creating the HCF, the Commission made the public policy determination that, for efficiency reasons, HCPs that have participated in other RHC support mechanisms should not be required to obtain new eligibility determinations before participating in the HCF. USAC is not free to impose filing requirements on HCF applicants that

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 54.702(c); *see also Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration CC Docket No. 96-45, FCC 98-306, 13 FCC Rcd 25058 (1998), at ¶ 16 (“USAC’s function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed.”).

the Commission itself has explicitly rejected. The Applicant here should not have to literally pay the price – in the form of lost HCF support – for USAC’s actions outside the scope of its authority.

Third, the loss of HCF support for FY 2014 would hinder the Applicant’s achievement of its primary responsibilities to deliver high-quality health care to their communities. The Applicant serves a remote, rural community primarily comprised of native Alaskans, and represents one of the only practical sources of modern health care services for its community. It is vital that this Applicant maintains access to the resources that are essential to its mission, including the telecommunications and DIA services that the Commission’s RHC mechanisms support. Thus, the RHCD’s erroneous decision to impose a Form 460 filing obligation on this Applicant, with the result that it has been unable to request FY 2014 HCF support at all, threatens to damage the public policy goal of the Commission’s rural health care program by leaving vital health care needs unmet in its community.

Conclusion

For the foregoing reasons, KIC hereby requests that the Commission waive the June 30, 2015 Form 462 filing deadline for its HCF funding request, 47 C.F.R. § 54.675(c)(4), and, to the extent required, a waiver of the corresponding deadline for filing the Form 463, which generally falls six months later, on December 31, 2015, 47 C.F.R. § 54.645(b).

Respectfully Submitted,



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